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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent,

On Writ of Certiorari to The Ninth Circuit Court of Appeals

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS

The Southeastern Legal Foundation, Inc. ("Foundation") submits its brief as *amicus curiae* in this case. The Foundation previously submitted a Motion for Leave to File as *amicus curiae* on Petitioner's Petition for Writ of Certiorari, and said motion was granted in the instant case.

The Foundation is a non-profit public interest law firm which advocates limited government, private property rights, and the free enterprise system. The Foundation's function is to engage in litigation

in support of these principles, and to oppose government abuse of authority at all levels. In the course of carrying out this mission, the Foundation provides direct legal representation to parties in civil litigation, and files *amicus curiae* briefs in selected cases, where important public policy issues are presented. The Foundation appeared as counsel of record in this Court for the petitioner in *Northeastern Florida Association of General Contractors v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297 (1993), and has appeared as *amicus curiae* in numerous cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994), and most recently in the instant case on petition for writ of certiorari, which was granted by this Court.

As an advocate for individual economic liberty and private property rights, the Foundation presents the views of its supporters who believe that such individual rights should be protected against undue government intrusion. The Foundation believes that the decision of the United States Court of Appeals for the Ninth Circuit in this case constitutes a failure to protect the rights of individuals who own private property and represents a departure from this Court's precedent as enunciated in *Lucas*. The Foundation believes this case provides an opportunity to further define the distinction between "economically viable use" and "value" in the analysis of categorical takings under *Lucas*, but more importantly, this case presents the Court with a clear opportunity to reaffirm the fundamental liberty interests of individuals against the discretionary caprice of government power.

STATEMENT OF THE CASE

Amicus Foundation adopts the statement of the case contained in the brief of Petitioner.

SUMMARY OF THE ARGUMENT

The Tahoe Regional Planning Agency's (TRPA) denial of all practical, probable or even potential use and enjoyment of Mrs. Suitum's parcel of land violates this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), in which this Court held that *per se* regulatory denial of all economically viable use of private property constitutes a compensable confiscation of private property under the fifth amendment to the Constitution of the United States.

Furthermore, the TRPA scheme for granting so-called "transferable development rights," which may be sold for value only upon TRPA approval and may be utilized by a purchaser only in a fashion approved by the TRPA, constitutes a fundamental violation of the constitutionally protected "bundle of rights" that inhere in individuals who own property and that have been recognized by this Court throughout the history of American jurisprudence.

ARGUMENT

I

THIS COURT SHOULD AFFIRM THE *LUCAS* PER SE TAKINGS RULE RECOGNIZING NONECONOMIC INTERESTS AS WELL AS ECONOMIC VIABILITY AS MEASURES OF VALUE OF PRIVATE PROPERTY OWNERSHIP, WHICH ARE PROTECTED AS CIVIL RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES

Mrs. Bernadine Suitum and her late husband purchased a parcel of land in Incline Village, Nevada in 1972 for the simple purpose for which the property had always been appropriate, for which real property throughout time has been employed and, in fact, for which lots in the residential subdivision in which the parcel is located have been used and developed for decades. Put simply, the Suitums planned nothing more than to build a home on their parcel of land.

After declaring the Suitums property a "Stream Environment Zone," the Tahoe Regional Planning Agency ("TRPA") determined in 1989 that the Suitums cannot develop the parcel and that, in fact, no developmental disturbance is allowed on the parcel by TRPA policy. On its face, such a denial of all economically beneficial or productive use of private property by an individual owner is a compensable

confiscation for purposes of the fifth amendment to the Constitution of the United States, as enunciated by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893 (1992).

In a scheme that turns an individual's constitutionally protected right to own and enjoy property on its ear, the TRPA has taken the further step of attempting to circumvent the Takings Clause of the fifth amendment by conjuring for an undetermined economic value certain "transferable development rights," or TDRs, which may be sold for economic value only upon TRPA approval and which may be utilized by a purchaser only in a fashion approved by the TRPA. In force and effect, the TRPA plan has transformed the fundamental civil right of property ownership and enjoyment into a conditional privilege subject to the arbitrary discretion of a government agency.

This Court's ruling in *Lucas* sets forth the justification for the rule that the fifth amendment is violated when land-use regulation "denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141 (1980). According to this Court's ruling in *Lucas*, regulations which deny economically beneficial or productive uses of land to an owner "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018, 112 S.Ct. at 2895.

In the instant case, the TRPA's regulatory denial of economically beneficial or productive uses of the Suitum's parcel of land begs the scrutiny of this Court precisely because the TRPA regulatory

scheme demands that the Suitum's land remain idle in the name of a discretionary determination of environmental conservation. This Court found in *Lucas* that "when the owner of real property is called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, *to leave his property economically idle*, he has suffered a taking." *Id.*, at 1019, 112 S.Ct. at 2895 (emphasis added).

Furthermore, the TRPA plan ignores utterly the important recognition by this Court that "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause." *Id.*, at 1019, 112 S.Ct. at 2895, n. 8. See, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436, 102 S.Ct. 3164, 3176 (1982) (right to exclude strangers from one's land); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 181, 100 S.Ct. 383, 393 (1979) (expectancies arise from government action regarding the exercise of property ownership that, if sufficiently important, will compel the government to condemn and pay for the land in question). This Court in *Loretto* said bluntly, "The government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439, 102 S.Ct. at 3178. In even more strident language, this Court has held that, "A state, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 452 (1980).

Therefore, the *value* of the Suitum's parcel of land in the instant case, assessed in the critical context of both economic development and noneconomic inherent interests, cannot be measured adequately by a formulaic dispensation of a so-called "right to sell" mere

fractions of development interests in the land (the so-called TDRs) that are dependent entirely on the TRPA's approval of the use of said right by a third-party purchaser.

The "economically viable use" doctrine applied by this Court in *Lucas*, which contemplates beneficial and productive use of land as well as the distinct investment-backed expectations of enjoyment of land, eschews the systematic allocation and perpetual governance of TDRs as enforced by the TRPA for the very reason that such regulation changes the terms of the equation for what justifies the taking of private property. This Court recognized that "when this governmental right of appropriation -- this asserted paramount right -- is exercised it shall be attended by compensation." *U.S. v. Lynah*, 188 U.S. 445, 465 (1903). The only constitutionally permissible way in which to justify a taking of real property without compensation is to deny that what a person holds is, in fact, property. See, *e.g.*, *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 452 (1980).

In the instant case, there can be no doubt that what Mrs. Suitum holds is private property. The TRPA has taken away Mrs. Suitum's right to use and enjoy her land and transferred those rights, at least in part, to an as yet undetermined third-party purchaser, as long as that purchaser intends to use the "rights" in a TRPA-approved manner. *Without TRPA approval, there is no economic value of any consequence in Mrs. Suitum's parcel of land.* The fact that Mrs. Suitum retains title to the land is irrelevant. "While the government does not directly proceed to appropriate title, yet it takes away the use and value; when that is done, it is of little consequence in whom the fee

may be invested." *Lynah*, 188 U.S. at 470.

As this Court has recognized, "Property does not have rights. People have rights. The right to enjoy property . . . is, in truth, a 'personal' right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1122 (1972). James Madison declared in 1792 that "as a man is said to have a right to this property, he may be equally said to have a property in his rights." PROPERTY, COMPTON'S INTERACTIVE ENCYCLOPEDIA, 1994.

As Justice Scalia noted aptly in *Lucas*, Justice Holmes warned in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922) that "[i]f . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].' *Id.*, at 415, 43 S.Ct., at 160." *Lucas*, at 1014, 112 S.Ct., at 2892-93. Indeed, the startling syllogism enunciated by Justice Holmes in *Mahon* takes on an even more apocalyptic tone when viewed in the context of this Court's complete integration of the Takings Clause into the penumbra of fundamental rights guaranteed by the fifth and fourteenth amendments to the Constitution of the United States. In the context of the instant case, Justice Holmes' admonition is nothing short of prophetic.

As a fundamental liberty and constitutionally protected right, an individual's ownership of property should be protected from the arbitrary discretion of the government. Mrs. Suitum's right to own,

use and enjoy her parcel of land has been restricted, monitored, and converted into a conditional privilege by an agency of government. Such conversion of interests violates the most basic tenets of property ownership, even at the very moment of imposition. "The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past." *Lucas*, 505 U.S. at 1032-1033, 112 S.Ct. at 2902 (Kennedy, concurring). This Court is presented with the opportunity to reaffirm the stature of the right to own and enjoy property unfettered as co-equal with all other constitutional rights, and to liberate the individual owner of property from the tentacled grasp of even the most circuitous of government invasions that cannot be condoned in this case without tacit endorsement of legislative legerdemain.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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